

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES EX REL. ALFRED Bernardin, plaintiff in error, v. BENJAMIN BUTTERWORTH, COMMIS- sioner of Patents.	}	No. 404.
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OPPOSITION TO MOTION FOR SUBSTITUTION.

This case grows out of a contest between Bernardin and one Northall with reference to the issuance of a patent. In the contest, on a declaration of interference, *heard* ~~and afterwards~~ on appeal in the court of appeals of the District of Columbia, it was held that Northall was entitled to a patent. Notwithstanding this decision, Bernardin instituted proceedings in mandamus against Benjamin Butterworth, praying the court to compel him as Commissioner of Patents to issue a patent to him. During the pendency of the case in this court Mr. Butterworth died and Mr. Duell was appointed his successor. Bernardin now moves to substitute Mr. Duell.

On behalf of the Government, and in support of its settled policy, I object to this substitution, because the action abated by the death of Mr. Butterworth. In effect a proceeding in mandamus is a personal action, resting upon the assumed fact that the defendant neglects or refuses to perform a duty imposed upon him by law. The writ is not directed against the office, but against the person holding the office.

The action abates when, by death or resignation, the defendant ceases to hold the office. *Non constat* but that his successor may perform the duty which he had refused to perform. (*United States v. Boutwell*, 17 Wall., 604, 609; *Warren Valley Stock Company v. Smith*, 165 U. S., 25, 31.)

It is submitted that the motion should be denied, and that the case should be dismissed.

JOHN K. RICHARDS,
Solicitor-General.